Radisson Muehlebach Hotel and Beulah A. Bass, Petitioner, and Hotel, Motel, Cafeteria, Restaurant, Bartenders, and Miscellaneous Employees Union Local 64, AFL-CIO. Case 17-RD-824

December 6, 1982

## DECISION AND CERTIFICATION OF REPRESENTATIVE

## By Chairman Van de Water and Members Jenkins and Hunter

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for Region 17 on August 10, 1981, an election by secret ballot was conducted on September 11, under his direction and supervision among the employees in the appropriate unit. At the conclusion of the election the parties were furnished with a tally of ballots which showed that there were approximately 244 eligible voters, and that 206 ballots were cast, of which 104 were for the Union, 77 were against, 2 were void, and 23 were challenged. The challenged ballots are not sufficient in number to affect the results of the election. Thereafter, the Employer timely filed objections to the election.

Pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on October 13, 1981, issued an Order Directing Hearing on Objections. A hearing was held on October 20 and 21 and November 2 at which all parties were afforded opportunity to be heard, to call and examine witnesses, to cross-examine witnesses, and to introduce other evidence relevant to the issues. On November 17, the Hearing Officer issued and duly served on the parties his Report on Objections, in which he recommended that the Employer's Objections 1 through 16, 18, and 20 through 22, and additional alleged objectionable conduct be overruled, but found merit in Objections 17 and 19, which alleged that the Union had made certain material misrepresentations of fact which justified setting aside the election. Thereafter, the Union timely filed exceptions to the Hearing Officer's report, and the Employer filed a brief in opposition thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. 2. The labor organization involved claims to represent certain employees of the Employer.

3. There is a question affecting commerce concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by the Employer at its facility at 12th and Baltimore, Kansas City, Missouri, but excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (six hours) per week for the period of January 1, 1981 to July 24, 1981.

The Board has considered the entire record in this proceeding, including the Employer's objections, the Hearing Officer's report, the Union's exceptions and brief, and the Employer's answering brief, and hereby adopts the Hearing Officer's findings, conclusions, and recommendations only to the extent consistent herewith.

The Hearing Officer found that Objections 17 and 19 alleged misrepresentations of loss of negotiated wage increases appearing in the Union's campaign distributions, and under the standard set forth in Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), and General Knit of California, Inc., 239 NLRB 619 (1978), recommended that Objections 17 and 19 be sustained and a second election be directed. The Hearing Officer recommended that the remainder of Objections 1 through 22 and additional alleged objectionable conduct considered be overruled.<sup>2</sup>

Briefly, Objection 17 states that the Union posted pro-Union and anti-Petitioner propaganda throughout the hotel on the day before the elec-

<sup>1</sup> All dates are in 1981 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendations that the Employer Objections 1 through 16, 18, and 20 through 22 be overruled and that additional alleged objectionable conduct be overruled.

tion, containing information which was false and misleading. Specifically, the posting stated that the Union had negotiated a 30-cent-per-hour wage increase for nontipped employees but that the negotiations were abruptly halted when the Petitioner filed her petition for decertification with the Board. The objection states that the Union had not negotiated such an increase and, furthermore, negotiations between the Union and the Employer continued after the filing of the petition. The objection alleges that such false and misleading statements were knowingly made in order to intimidate and coerce unit employees to vote for the Union, thus impairing their right to a free and fair election.

The Hearing Officer concluded that the misstatement on the handbill with respect to a specific wage increase which the Union had negotiated amounted to a substantial and material misrepresentation of fact which had a significant impact on the election. The Hearing Officer found no evidence that the Union had in fact secured a 30-cent wage increase for nontipped employees, yet the handbill suggested that, but for the filing of the decertification petition, both tipped and nontipped employees would have received wage increases.3 The Hearing Officer further found that, since the handbills which contained the misrepresented wage increase were distributed on the day before the election, the Employer did not have a sufficient opportunity to respond to the allegations therein and that the description of the status of negotiations contained in the handbill was within the exclusive knowledge of the Union. Because he found that the employees would be unable to readily discern the accuracy of the handbill, the Hearing Officer recommended that Objection 17 be sustained to the extent that it alleged that the Union engaged in misrepresentations of fact concerning wages which the Union had negotiated.

Objection 19 alleges that when voting employees entered the hotel on election day they were stopped by union agents and given preprinted cards which contained statements that were false and misleading in that they misrepresented wages and benefits.

The Hearing Officer found that the cards' statement that employees could lose "negotiated wage increases" by voting against the Union was on its face accurate. However, he concluded that by distributing the cards with the handbills discussed in Objection 17 the Union was clearly implying that employees could lose the 30-cent-per-hour wage increase for nontipped employees which the Union

had not obtained. The Hearing Officer recommended that Objection 19 be sustained.

The Hearing Officer found that the Union's conduct was objectionable based on Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), and General Knit of California, Inc., 239 NLRB 619 (1978), holding that elections may be set aside where a misrepresentation involves a substantial departure from the truth at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation may reasonably be expected to have a significant impact on the election.

Recently, in Midland National Life Insurance Co., 263 NLRB 127 (1982), we announced that we will no longer probe into the truth or falsity of the parties' campaign statements and that we will not set elections aside on the basis of misleading campaign statements which involve the use of neither documents which render the voters unable to recognize propaganda for what it is, nor an official Board document which has been altered in such a way as to indicate an endorsement by the Board of a party to an election. Therefore, as we found in Midland, inasmuch as the Employer's Objections 17 and 19 allege nothing more than misrepresentations of fact, they are hereby overruled. Because the tally of ballots shows that the Union received a majority of the valid ballots cast, we shall certify the Union as the representative of the employees in the appropriate unit.

## CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Hotel, Motel, Cafeteria, Restaurant, Bartenders, and Miscellaneous Employees Union Local 64, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment:

All employees employed by the Employer at its facility at 12th and Baltimore, Kansas City, Missouri, but excluding executives, superintendents, department heads having the authority to hire and fire, supervisory employees having the authority to hire and fire and having an executive status, supervisory employees having an executive status with the

<sup>3</sup> The Hearing Officer found that the handbill suggested that nontipped employees would have received an additional \$132 and tipped employees an additional \$110 had the decertification petition not been filed.

<sup>4</sup> Member Jenkins adheres to the dissenting opinion in Midland National, supra, but considers himself institutionally bound to apply the majority standard of that case until such time as it is reversed.

right to effectively recommend hiring and firing, accounting or control employees, timekeepers, security officers, office employees, sales personnel, desk and mail clerks, checkers, cashiers, typists, stenographers, secretaries, supervisory stewards, storeroom and wineroom personnel, and all extra employees who have not worked at least an average of two functions (six hours) per week for the period of January 1, 1981 to July 24, 1981.